TEAM GUERRERO

ARBITRATION PURSUANT TO THE ARBITRATION RULES OF

PERMANENT COURT OF ARBITRATION

PCA Case Nº 2016-74

ATTON BORO LIMITED

(CLAIMANT)

versus

REPUBLIC OF MERCURIA

(RESPONDENT)

MEMORIAL FOR RESPONDENT

25 September 2017

TABLE OF CONTENTS

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LIST OF ABBREVIATIONS

ABBREVIATION	FULL CITATION
¶ (¶¶)	Paragraph (Paragraphs)
AB Company	Atton Boro Company
AB Group	Atton Boro Group
AB Affiliates	Atton Boro Group Affiliates
Annex 1	Mercuria-Basheera BIT
Annex 2	Press Statement by Minister for Health Mr. Joseph Bell
Annex 3	2006 Annual Report of National Health Authority of Mercuria
Annex 4	Law No. 8458/09
Atton Boro	Atton Boro Limited
Award	Reef Arbitral Award
Basheera	Kingdom of Basheera
BIT	Agreement Between The Republic Of Mercuria And The Kingdom Of Basheera For The Promotion And Reciprocal Protection Of Investments
Directors	Atton Boro Company Directors
Dispute Settlement Provision	Article 8.1, BIT
FET	Fair and Equitable Treatment
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
Id.	Ibidem (the same as above)
ILC	International Law Commission
ILC Articles	ILC Articles on the Responsibility of States for Internationally Wrongful Acts
IP	Intellectual Property

IP Law	Intellectual Property Law
L	Line
LTA	Long-Term Agreement
Mercuria	Republic of Mercuria
NHA	National Health Authority
NHA Act	National Health Authorities Act
Notice	Notice of Arbitration
Notice-Exhibit	Timeline of the Proceedings in Enforcement Application No.873/2009 Before the Honorable High Court of Mercuria
Patent	Valtervite Patent
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
Reef	Republic of Reef
Response	Response to Notice of Arbitration
Timeline	Timeline of the Proceedings
Tribunal	Permanent Court of Arbitration
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
Vienna Convention	Vienna Convention on the Law of Treaties of 1969
WTO	World Trade Organization
WTODSU	World Trade Organization Dispute Settlement Understanding

STATEMENT OF FACTS

1. In its 2003 Annual Report, the National Health Authority ("**NHA**") of the Republic of Mercuria ("**Mercuria**"), alerted the government of the imminent greyscale concern that could spiral into a national crisis (¶6,PO1). Greyscale is a debilitating disease that causes progressively stiffening muscles, swollen limbs, and severe joint pain (Annex 3) mainly affecting the working-age population in Mercuria (Annex 3). Greyscale is an incurable, sexually transmitted disease (¶12,PO1) that is more difficult to control since transmission is not limited to sexual contact, but also through other routes (**L**1585,PO3).

2. The Report further stated that the treatment available in Mercuria is only barely effective if the infection was detected at very early stage. This fell far short of global standards (¶6,PO1).

3. Atton Boro Limited ("**Atton Boro**") is a pharmaceutical company that manufactures and sells essential medicines in Mercuria (¶5,PO1). Atton Boro produces Sanior, the only effective greyscale treatment (¶6,PO1) that contains the patented Valtervite compound (¶6,Notice).

4. The NHA is an independent entity (**L**1591,PO3) that engages in public health initiatives and ordinary commercial activities, pursuant to its goal of securing universal healthcare in Mercuria (¶2, Annex 2).

5. On May 2004, the NHA wrote an invitation to Atton Boro to make an offer for supplying Sanior. On 25 November 2004, the NHA and Atton Boro entered into a Long-Term Agreement ("**LTA**") for the supply of Sanior (¶10,PO1). There is no record of participation by Mercurian officials in the negotiation of the LTA (**L**1590,PO3).

6. In its 2006 Annual Report, the NHA highlighted the extent of the greyscale public health crisis. The incidence and prevalence of greyscale, as recorded in the data, far exceeded even liberal estimates projected by the NHA (¶14,PO1). What was once a concern had already spiraled into a public health crisis (¶6,PO1).

7. The need for a greater supply of greyscale drug prompted NHA to ask for price adjustments for Sanior. This proved to be futile since Atton Boro was only willing to offer a further discount of 10% (¶15,PO1). On 10 June 2008, the NHA terminated the LTA, citing unsatisfactory performance (¶17,PO1).

8. As a result of the LTA termination, Atton Boro initiated arbitration proceedings before the Reef Arbitral Tribunal, which granted it an Award of $40 Million ("**Award**") (¶17,PO1). Atton Boro initiated enforcement proceedings for its Award against the NHA in 2009 (¶18,PO1). At present, the enforcement proceedings remain pending (**L**1590,PO3).

9. On 10 October 2009, the President of Mercuria promulgated National Legislation for its Intellectual Property Law ("**IP Law**"), which introduced a provision allowing for compulsory licensing measures (¶20,PO1). The IP Law was enacted pursuant to the Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS**"), of which Mercuria is a Party (¶2,PO2).

10. On November 2009, HG-Pharma, a Mercurian generic drug manufacturer, filed an application for a license to manufacture Valtervite (¶21,PO1). Atton Boro was impleaded, but it voluntarily refused to participate in the hearings (**L**1576,PO3). The High Court, finding merit in HG-Pharma's application, granted the compulsory license. The compulsory license was to be effective until greyscale was no longer a threat to public health in Mercuria (¶21,PO1).

11. Atton Boro did not assail the validity of the grant of compulsory license or the adequacy of the royalty, despite having access to the judicial review mechanism of Mercuria (¶1578-1580,PO3). Instead, after its failed Sanior operations, Atton Boro filed a Notice of Arbitration ("**Notice**") pursuant to Article 8.1 of the Agreement Between the Republic of Mercuria and the Kingdom of Basheera for the Promotion and Reciprocal Protection of Investments ("**BIT**"). Mercuria filed its Response to the Notice of Arbitration ("**Response**") and invoked the Denial of Benefits Clause of the BIT.

ARGUMENTS

12. Mercuria submits that the Tribunal has no jurisdiction over the dispute (**I**). Mercuria did not breach its obligations under the BIT (**II**). Thus, Atton Boro is not entitled to compensation in the amount of $1.54 Billion (**III**).

I. The Tribunal has no jurisdiction over the claims in relation to the Award (A), and in any case, it cannot exercise jurisdiction as Mercuria effectively denied Atton Boro the benefits of the BIT (B)

A. The Tribunal has no jurisdiction over the claims in relation to the Award

13. Consent is the cornerstone of the Tribunal's jurisdiction.[1] The Tribunal in ***Daimler v. Argentina*** provided the starting point in determining whether a tribunal has jurisdiction is the presumption that a host State did not consent to arbitration. "Non-consent is the default rule; consent is the exception."[2] Atton Boro has the burden of proving by preponderance of the evidence[3] that its claims fall squarely within the scope of Mercuria's consent to arbitration under Article 8.1 of the BIT.[4]

14. Article 8.1 of the BIT provides, "*Any dispute… arising out of or in relation to this Agreement, or the… breach… thereof, shall… be settled by arbitration.*"

15. For the Tribunal to exercise jurisdiction over the claims, Atton Boro must cumulatively establish the jurisdictional requirements. The *first* requirement is that the claims involve an asset

[1] *Wintershall,*¶160.
[2] *Daimler*,¶ ¶174-175.
[3] *Duke*,¶130.
[4] *Daimler*,¶175.

qualifying as an *investment* under the BIT (**A.1**).[5] The *second* requirement is that the claims sufficiently put forward a *BIT breach* (**A.2**).[6] These requirements must be cumulatively established for a claim to fall within the scope of Article 8.1 of the BIT.

16. Atton Boro must prove that following claims it raised in the Notice satisfy the jurisdictional requirements under the BIT:

> The *first* claim is that Mercuria breached the Umbrella Clause through the NHA's termination of the LTA (¶¶13-14,Notice).
> The *second* claim is that Mercuria breached the FET standard through the conduct of its Judiciary (¶13,Notice).
> The *third* claim is that Mercuria breached the FET standard through the amendment of its IP Law and grant of compulsory license to HG-Pharma (¶13,Notice).

17. In the determination of its jurisdiction, the Tribunal must begin with a *prima facie* examination of the claims raised by Atton Boro.[7] Such examination ascertains whether the claims, considering their underlying subject matters and legal norms, meet the jurisdictional requirements of the BIT.[8]

18. The following legal rules qualify the parameters of the *prima facie* examination.

19. *First*, a tribunal should not solely depend on the claimant's allegations.[9] The Tribunal in ***Pan American v. Argentina*** explained, a tribunal cannot depend "on characterizations made by a claimant alone" as such undermines the *competence-competence* principle.[10]

[5] *Continental,*¶75.
[6] *Id.*
[7] *Id.*¶60.
[8] *Id.*
[9] *Pan American*,¶50.
[10] *Id.*

20. *Second*, a tribunal must consider all the facts and arguments advanced by the Parties.[11] In ***Continental Casualty v. Argentina***, the Tribunal recognized that a respondent may present evidence that a claimant's allegations lack basis.[12]

21. Consequently, Atton Boro cannot hide behind the mischaracterizations of its claims as "*disputes*" within the Tribunal's jurisdiction. Atton Boro fails to discharge its burden of proof, as it did not establish the jurisdictional requirements under Article 8.1 of the BIT.

A.1. Atton Boro's claims do not involve investments protected under the BIT

22. For the Tribunal to exercise jurisdiction under the BIT, the dispute must arise directly out of an investment.[13] Atton Boro must prove that the assets, subject of its claims, are investments under the BIT.[14]

23. The meaning of an *investment* under the BIT must be interpreted by reference to international law.[15] Tribunals have adhered to the interpretative rules found in the Vienna Convention on the Law of Treaties ("**Vienna Convention**"), as such reflect customary international law.[16]

24. Article 31 of the Vienna Convention provides:

> *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*

25. Article 32 of the Vienna Convention provides that supplementary means of interpretation must be resorted to if interpretation under Article 31 "[l]eads to a result which is *manifestly absurd or unreasonable*."

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[11] *Fisheries* 37-38.
[12] *Continental*,¶61.
[13] *Philip Morris,* Jurisdiction,¶28.
[14] *Continental*,¶75.
[15] *Saipem*,¶82.
[16] *Mondev*,¶43.

26. Applying the Vienna Convention rules of interpretation, the LTA and the Award do not qualify as investments protected under the BIT.

27. Article 1.1 of the BIT provides the definition of an investment:

> "*[T]he term investment means any kind of asset held or invested… by an investor of one Contracting Party in the territory of the other Contracting Party*."

28. The definition of an investment is followed by an enumeration of five categories of an investment. Among the categories is Article 1.1.c – "*claims to money, and claims to performance under contract*." A *mechanical application*[17] of the category in Article 1.1.c automatically qualifies any contract and any arbitral award as an investment. Atton Boro conveniently applies a *mechanical application* of the categories, without appreciating the terms of the BIT "in their context and in the light of its object and purpose."[18]

29. In ***Romak v. Uzbekistan***, the Tribunal rejected the *mechanical application*[19] of the enumerated categories. The Tribunal emphasized that the categories are "not exhaustive and are clearly intended as *illustrations*."[20] The categories are designed to shed light on potential forms of investments, and not to limit or expand the qualification of an investment through a *mechanical application* thereof. Thus, assets that fit in the category under Article 1.1.c may potentially qualify as investments, but "it does not follow that *all* such assets necessarily so qualify."[21]

30. A *mechanical application* of the category under Article 1.1.c yields *manifestly absurd or unreasonable* results. If all assets under the category automatically qualify as investments, then *claims to money* such as tax refunds and lottery winnings, or *claims to performance under contract* such as delivery of office supplies and performance of medical services, would all be considered investments. Such limitless application of the concept of an *investment* under the BIT must be rejected, as it would unduly expand the Tribunal's jurisdiction.

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[17] *Romak*,¶184.
[18] Article 31.1, VCLT.
[19] *Romak,*¶184.
[20] *Id.*¶188.
[21] *Id.*

31. The Tribunal in ***Romak v. Uzbekistan*** held that irrespective of the arbitral tribunal resorted to in an investment dispute, the *inherent meaning* of an investment "entail[s] a *contribution* that extends over a *certain period of time* and that involves some *risk*."[22] The definition advanced by the Tribunal is an application of the *Salini* test, which has been used by several tribunals to determine the existence of an investment.[23]

32. The *Salini* test was introduced in ***Salini v. Morocco***, wherein the Tribunal identified four elements that constitute an investment: *substantial commitment of capital*, *certain duration*, *investment risk* and *contribution to the host State's economic development*.[24] The Tribunal in ***Philip Morris v. Uruguay*** recognized that the elements set forth under the *Salini* test are "typical features of investments… [that] may assist in identifying or excluding in extreme cases the presence of an investment."[25]

33. In light of the above interpretative rules governing the determination of an investment, the LTA and the Award are not investments under the BIT.

a. The LTA is not an investment under the BIT

34. The LTA is a supply contract entered into by the Atton Boro and the NHA, wherein the former would supply the latter a minimum amount of Sanior at a pre-determined rate (¶10,PO1). As discussed above, not all "*claims to money, and claims to performance under contract*" qualify as investments under the BIT.[26] The LTA cannot be made the subject of Atton Boro's claim of a BIT breach because it is *a purely commercial transaction* and not an investment.

[22] *Romak,*¶207.
[23] *Saipem*; *White*; *Romak*.
[24] *Salini*,¶52.
[25] *Philip Morris*, Jurisdiction,¶206.
[26] *Supra* **I.A.1.**

35. The Tribunals in ***Joy Mining v. Egypt*** and ***Romak v. Uzbekistan*** ruled out supply contracts as investments by applying the *Salini* test. The Tribunals found the supply contracts to be *purely commercial transactions*.[27]

36. A purely commercial transaction is determined through an examination of the primary activities involved in the performance of the contract.[28] The primary activity involved in the performance of the LTA is the supply of Sanior from Atton Boro to the NHA – "a mere transfer of title over goods in exchange for full payment."[29] In light of its nature as a supply contract, the application of the *Salini* test yields the result that the LTA is a *purely commercial transaction* and not an investment.

37. The LTA did not entail a *substantial commitment of capital* because it did not involve any contribution in "cash, kind, or labor"[30] in Mercuria. The supply of Sanior in exchange for a pre-determined price (¶10,PO1) is a mere transfer of title over goods in exchange for a price.[31] The Tribunal in ***Romak v. Uzbekistan*** refused to consider the supply of goods as a contribution of capital, "given that immediate payment at a market rate was envisaged under the Romak Supply Contract."[32] Further, Atton Boro's manufacturing activities in Mercuria fails to meet the element of *substantial commitment of capital*. The manufacturing of Sanior in Mercuria is a mere incidental activity, and not the primary activity[33] contemplated under the LTA (¶10,PO1).
Thus, no substantial capital was committed through the LTA.[34]

38. The element of *certain duration* is wanting. The LTA provides an uncertain duration as the effectivity thereof is "*subject to the Supplier's satisfactory performance*" (¶10,PO1). In ***Global Trading v. Ukraine***, the Tribunal held that a supply contract's "limited duration" fails to qualify it as an investment.[35] Thus, there was no certain duration.

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[27] *Joy Mining*; *Romak*.
[28] *Joy Mining*,¶¶55-56.
[29] *Romak*,¶222.
[30] *Romak*,¶214.
[31] *Id.*¶222.
[32] *Id.*¶215.
[33] *Joy Mining*,¶¶55-56.
[34] *Id.*
[35] *Global Trading*,¶56.

39. The LTA did not involve an *investment risk*. In ***Romak v. Uzbekistan***, the Tribunal held there is investment risk when "the investor simply cannot predict the outcome of the transaction."[36] The risks carried by the LTA – non-performance, termination, non-payment, and delay – were considered by the Tribunals in ***Romak v. Uzbekistan*** and ***Joy Mining v. Egypt*** as the "risk[s] of doing business generally."[37] Thus, the LTA did assume investment risk.

40. The LTA did not *contribute to the host State's economic development* because the LTA contributed nothing more than a stable supply of a consumer good. The fact that the NHA was distributing Sanior does not provide any economic benefit.[38] In ***Global Trading v. Ukraine***, the Tribunal held that "[t]he fact that the trade… was seen to further the policy priorities… does not bring about… economic benefit."[39] Thus, the LTA did not contribute to Mercuria's economic development.

41. As the LTA fails the *Salini* test, it is ruled out as an investment under the BIT.

b. The Award is not an investment under the BIT

42. The Award granted by the Reef Arbitral Tribunal (¶17,PO1) cannot be made the subject of Atton Boro's claim of a BIT breach for the simple reason that the Award is not an investment.

43. Following the interpretative framework discussed above,[40] the *mechanical application* of the category under Article 1.1.c must be rejected as such would lead to absurdity.[41] No investment tribunal has ever considered an arbitral award to be an investment in itself.[42]

[36] *Romak*,¶230.
[37] *Id*. ¶229; *Joy Mining*,¶57.
[38] *Romak*,¶237.
[39] *Global Trading*,¶56.
[40] *Supra* **I.A.1.**
[41] Article 32, Vienna Convention.
[42] CLASMEIER 17-18.

44. The Tribunal in ***GEA v. Ukraine***, while appreciating that the subject investment treaty contained a similarly-worded investment category "*claims to funds*,"[43] held, "the ICC Award cannot constitute an 'investment'… it is a legal instrument,"[44] which "involves no contribution to, or relevant economic activity within" the host State.[45]

45. The application of the *Salini* test rules out the Award as an investment.

46. The element of *substantial commitment of capital* refers to "any dedication of resources that has economic value"[46] made in the territory of the host State.[47] There was no substantial commitment of capital in Mercuria's territory, as the commitment of capital was made in Reef, where the Award was granted (¶17,PO1).

47. The element of *certain duration* is wanting, as the Award "does not reflect a commitment... beyond a one-off transaction."[48] The Award does not carry with it any defined period for its enforcement.

48. The element of *investment risk* is one that entails an unpredictable outcome.[49] Ordinary risks do not amount to investment risks.[50] The Award does not carry any investment risk, but the ordinary risk of cancellation or non-enforcement.

49. The element of *contribution to the host State's economic development* is wanting. The Award does not *contribute to Mercuria's economic development* because the enforcement thereof would result in the outflow of $40 Million from Mercuria's territory.

50. As the Award fails the *Salini* test, its failure to qualify as an investment is affirmed.[51]

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[43] Article 1.1.c, Germany-Ukraine BIT.
[44] *GEA,*¶161.
[45] *Id.*¶162.
[46] *Romak*,¶214.
[47] *SGS v Paraguay*, Jurisdiction,¶110.
[48] *Romak*,¶227.
[49] *Romak,*¶230.
[50] *Id.*¶231.
[51] *Philip Morris*, Jurisdiction,¶206.

51. Additionally, the Transformation Clause under Article 1.1 of the BIT does not extend the protection of the BIT to the Award.

52. The Tribunals in ***Saipem v. Bangladesh***, and ***White v. India*** extended BIT protection to arbitral awards only because they stemmed from underlying investments.[52] In ***Romak v. Uzbekistan***, the Tribunal refused to extend the protection of the investment treaty to an arbitral award because the underlying supply contract was not an investment.[53]

53. The underlying transaction of the Award is the LTA, as the Award stemmed from the breach thereof (¶17,PO1). As discussed above, the LTA is not an investment protected under the BIT.[54] Because the Award does not stem from an underlying investment, the Transformation Clause does not operate to extend the protection of the BIT.[55]

54. Atton Boro fails to establish that the LTA and the Award are investments. As the dispute does not directly arise out of an investment,[56] the Tribunal has no jurisdiction.

A.2. Even if Atton Boro's claims involve investments protected under the BIT, the Tribunal has no jurisdiction, as the claims do not qualify as disputes under Article 8.1 of the BIT

55. Article 8.1 of the BIT provides that the Tribunal's jurisdiction is limited to claims of a dispute concerning breaches of the BIT.[57]

56. Atton Boro alleges that Mercuria's "acts constitute an infringement of the protections guaranteed to Atton Boro under the BIT" (¶13,Notice). To establish the Tribunal's jurisdiction,

[52] CLASMEIER.
[53] *Romak,*¶211.
[54] *Supra* **I.A.1.a.**
[55] *Romak*,¶211.
[56] *Philip Morris,* Jurisdiction,¶28.
[57] *Continental*,¶63.

57. "labeling is not enough."[58] In ***Continental Casualty v. Argentina***, the Tribunal held that it would not have jurisdiction over the dispute, if respondent proves "that the case has no factual basis even at a preliminary scrutiny."[59]

58. An analysis of all relevant factual and legal matters,[60] leads to the conclusion that none of the assailed acts amount to BIT breaches. Thus, the Tribunal does not have jurisdiction.[61]

a. The first claim that *the NHA's termination of the LTA breached the Umbrella Clause* does not qualify as a dispute within the Tribunal's jurisdiction

59. Atton Boro claims that Mercuria, through the NHA's termination of the LTA, breached the Umbrella Clause (¶13,Notice). Atton Boro must prove that the Umbrella Clause covers the LTA (***a.i***), and that it is not merely raising a contractual breach (***a.ii***). Atton Boro fails to establish both requirements essential to qualify its claim as a dispute under Article 8.1 of the BIT.

a.i. The Umbrella Clause does not cover the LTA because it is not an obligation entered into by Mercuria

60. The Umbrella Clause under Article 3.3 of the BIT provides:

> "*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investor of the other Contracting Party.*"

61. The Umbrella Clause does not cover the LTA because the LTA was not *entered into* by Mercuria. The LTA was entered into by the NHA (¶9,PO1), a separate and independent public entity responsible for its own commercial affairs (**L**1591,PO3).

[58] *Pan American*,¶250.
[59] *Continental*,¶61.
[60] *Inceysa*,¶149.
[61] *Continental,*¶63.

62. There is no doubt that the NHA is a public entity. However, the Tribunal in ***Hamester v. Ghana*** emphasized that not all acts of a public entity are attributable to the State.[62] Attribution must be established under customary international law[63] embodied in Article 4 and Article 5 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts ("**ILC Articles**").[64]

63. *Article 4 of the ILC Articles* provides, "[t]he conduct of any State organ shall be considered an act of that State under international law."[65] In ***Hamester v. Ghana***, the Tribunal ruled that without an internal law designating the public entity as a State organ, such entity is not part of the organic structure of the State.[66] Atton Boro cannot point to an internal law specifically designating the NHA as a State organ, as the National Health Authorities Act ("**NHA Act**") is silent on this matter (**L**1593,PO3).

64. When Atton Boro entered into the LTA, it knew that Mercuria intentionally created the NHA as a distinct legal entity pursuing its own public health objectives (Annex 2), as it concluded several agreements with Mercuria on certain occasions and with the NHA on other occasions (¶5,PO1). As the NHA is a separate and independent entity (**L**1591,PO3), it cannot be considered a State organ under international law.[67]

65. Alternatively, neither can *Article 5 of the ILC Articles* establish the NHA's entry into the LTA as attributable to Mercuria. Attribution under Article 5 of the ILC Articles is conditional upon a public entity's actual exercise of its governmental authority in the commission of the act in question.[68]

66. Although the NHA entered into the LTA pursuant the general interest of obtaining access to pharmaceutical products, such circumstance does not make the NHA's act attributable to

[62] Hamester,¶172.
[63] *Id.*
[64] *Jan de Nul*,¶89.
[65] Article 4, ILC Articles.
[66] *Hamester*,¶172.
[67] *Noble Ventures*,¶69.
[68] Article 5, ILC Articles.

Mercuria. The issue of whether or not the public entity's act in question was done in its governmental capacity or in its commercial capacity must be resolved to determine attribution.[69]

67. The NHA did not enter into the LTA through the exercise of its governmental authority, but merely in its commercial capacity. In ***Bosh v. Ukraine***, the Tribunal found that a public entity's entry into a contractual transaction was not attributable to the host State, as such was a purely commercial act.[70] Since the NHA's act of entering into the LTA did not involve the exercise of its governmental authority, Article 5 of the ILC Articles does not apply to establish the NHA's entry into the LTA as attributable to Mercuria.

68. Since the NHA's entry into the LTA is not attributable to Mercuria, the Umbrella Clause does not apply. Without establishing the Umbrella Clause's application, Atton Boro cannot claim a breach thereof. Thus, Atton Boro fails to put forward a breach of the BIT. The Tribunal has no jurisdiction.

a.ii. Atton Boro raises nothing more than a contractual breach that has already been litigated by the Reef Arbitral Tribunal

69. Even if the Umbrella Clause applies in this case, the Tribunal still does not have jurisdiction because Atton Boro failed to prove that its claim is not merely a contractual breach. Atton Boro only assails the premature termination of the LTA (¶13,Notice), which is a purely contractual claim that has already been litigated by the Reef Arbitral Tribunal (¶17,PO1).

70. Article 8.1 of the BIT does not extend the scope of the Tribunal's jurisdiction to contractual breaches. In ruling that it had no jurisdiction, the Tribunal in ***Pan American v. Argentina*** held that the "umbrella clause does not extend its jurisdiction over any contract claims… stemming solely from the breach of a contract."[71]

[69] *Jan de Nul*,¶170.
[70] *Bosh,*¶177.
[71] *Pan American*,¶112.

71. In the absence of any allegation of sovereign interference, Atton Boro's claim is a purely contractual breach that does not qualify as a BIT breach. The Tribunal in ***Vivendi v. Argentina*** affirmed this principle, as it held that a State may breach a contract without breaching an investment treaty.[72]

72. Since Atton Boro fails to put forward a breach of the BIT, its claim fails to qualify as a dispute under Article 8.1 of the BIT. The Tribunal has no jurisdiction over Atton Boro's first claim.

b. The second claim that *the conduct of Mercuria's Judiciary breached the FET standard* does not qualify as a dispute within the Tribunal's jurisdiction

73. Atton Boro claims that Mercuria, through the conduct of its Judiciary, breached the FET standard by subjecting the enforcement proceedings to "the unreasonable delay of over seven years" (¶13,Notice). Atton Boro makes a grave allegation that Mercuria's Judiciary denied it justice. For the Tribunal to have jurisdiction over this claim, Atton Boro must have exhausted domestic remedies.

74. In ***Toto v. Lebanon***,[73] the Tribunal held that the exhaustion of domestic remedies is a requirement to support claims of denial of justice under an investment treaty. A Tribunal must be satisfied that there is *prima facie* evidence of a denial of justice[74] to ensure that it is "not flooded with claims which have no chance of success, or may even be abusive in nature."[75]

75. Atton Boro failed to exhaust domestic remedies. Even Atton Boro's Timeline of the Proceedings ("**Timeline**") (Notice-Exhibit) indicates that the Judiciary has been actively entertaining the enforcement proceedings, with adjournments no longer than four months

[72] *Vivendi*,¶95.
[73] *Toto*, Jurisdiction,¶164.
[74] *Id.*,¶153.
[75] *Impregilo*,¶254.

(Notice-Exhibit). Domestic remedies have not been exhausted as the enforcement proceedings remain pending (**L**1595,PO3). In ***Chevron v. Ecuador***, the Tribunal appreciated futility only because the claimant had prosecuted its claim to the very last stage yet the domestic court failed to render a decision.[76] Had Atton Boro continued participating in the enforcement proceedings, instead of initiating this arbitration proceeding, it would have achieved "effective and sufficient means of redress."[77]

76. Since Atton Boro failed to exhaust domestic remedies, its claim of a denial of justice fails to qualify as a dispute under Article 8.1 of the BIT. The Tribunal has no jurisdiction over Atton Boro's second claim.

c. The third claim that *the amendment of the IP Law and the grant of compulsory license breached the FET standard* does not qualify as a dispute within the Tribunal's jurisdiction

77. Atton Boro claims that Mercuria's compulsory licensing measures "disregard international covenants such as TRIPS (¶13,Notice). For the Tribunal to have jurisdiction over this claim, Atton Boro must establish that the assailed acts amount to a BIT breach, and not a breach of other international agreements.

78. Atton Boro fails to establish this requirement. Atton Boro's claim for a breach of the FET standard is a disguised claim for a breach of another international agreement, TRIPS. To insist that the Tribunal has jurisdiction over disputes concerning breaches of TRIPS would unduly extend of the scope of the Tribunal's jurisdiction. This would run contrary to the object and purpose of the BIT to "*build on*"[78] rights and obligations under other international agreements.

79. In the settlement of disputes arising out of other international agreements, the Tribunal must defer to the pre-established dispute settlement mechanisms governing such other international

[76] *Chevron,* Merits.
[77] *Philip*, Award,¶503.
[78] Preamble, BIT.

agreements. In ***Plama v. Bulgaria***, the Tribunal held that dispute settlement provisions must be respected as such "have been specifically negotiated with a view to resolving disputes under [a particular] treaty."[79]Atton Boro should not be allowed to unilaterally dislodge and circumvent the pre-established dispute settlement mechanism[80] governing alleged violations of TRIPS.

80. The World Trade Organization Dispute Settlement Understanding ("**WTODSU**") governs the settlement of disputes concerning breaches of TRIPS.[81] Building on the provisions of the WTODSU, the BIT does not empower the Tribunal to settle the breach of TRIPS raised by Atton Boro. Atton Boro's proper remedy is to resort to diplomatic protection in order to raise the issue before the World Trade Organization.

81. Without a determination of the breach of TRIPS, Atton Boro's claim that Mercuria breached the FET standard has no leg to stand on. Since Atton Boro fails to put forward a breach of the BIT, its claim fails to qualify as a dispute under Article 8.1 of the BIT. The Tribunal has no jurisdiction over Atton Boro's third claim.

B. Even if the Tribunal has jurisdiction, it cannot exercise jurisdiction as Mercuria effectively denied Atton Boro the benefits of the BIT

82. In its Response, Mercuria exercised its prerogative under Article 2.1 of the BIT (¶5,Response).

83. The Denial of Benefits Clause renders Mercuria's consent to arbitration conditional, and allows Mercuria to deny the benefits of the BIT.[82] The Tribunal in ***Guaracachi v. Bolivia*** recognized that a claimant's right to initiate arbitration "forms part of the package of benefits afforded," and thus a tribunal "will be deprived of jurisdiction"[83] when certain conditions obtain.

[79] *Plama,* Jurisdiction,¶207.
[80] *Wintershall,*¶167.
[81] Article 1, WTODSU.
[82] *Guaracachi*,¶372.
[83] *Id.*

84. The Denial of Benefits Clause provides that the benefits of the BIT may be denied to:

> *"[A] legal entity, if citizens or nationals of a third state own or control such entity and if such entity has no substantial business activities in the territory of the Contracting Party in which it is organized."*

85. Mercuria fulfilled the conditions for an effective exercise of the Denial of Benefits Clause of the BIT, as the invocation thereof was timely made (**B.1**) and the conditions thereunder were cumulatively satisfied (**B.2**).[84]

B.1. Mercuria timely invoked the Denial of Benefits clause of the BIT

86. Under the Arbitration Rules of the Permanent Court of Arbitration jurisdictional objections must be made "no later than in the statement of defense."[85] The Tribunal in ***Ulysseas v. Ecuador*** affirmed that an invocation of a denial of benefits clause is timely when made by a respondent upon raising its objections on jurisdiction or upon statement of its defenses.[86]

87. Mercuria invoked the Denial of Benefits Clause in its Response submitted on 7 November 2016 (¶1,Response). The invocation was timely as it was done upon raising the objections on jurisdiction.

B.2. Both conditions under the Denial of Benefits Clause obtain

88. The Denial of Benefits Clause provides for two conditions that must obtain at the time of the invocation thereof.[87] The *first* condition is that Atton Boro is owned or controlled by citizens or nationals of a third State (**a**). The *second* condition is that Atton Boro has no substantial business

[84] *AMTO,*¶69.
[85] Article 23.2, PCA Rules.
[86] *Ulysseas*,¶172.
[87] *Id.*¶379.

activities in the Kingdom of Basheera ("**Basheera**"), the place in which it is organized (¶4,PO1) (**b**). Both conditions obtain in this case.

a. Atton Boro is controlled by citizens or nationals of a third State

89. In ***Plama v. Bulgaria***, the Tribunal recognized that the determination of "control" entails an inquiry of whether the controller has "an ability to exercise substantial influence over the legal entity's management [and] operation."[88] The determination of control may entail piercing through successive corporate layers. In ***TSA v. Argentina***, the Tribunal pierced successive corporate layers to identify foreign control and "reach for the reality behind the cover of nationality."[89]

90. Piercing through the successive corporate layers created by Atton Boro, Atton Boro and Company ("**AB Company**") or AB Company Directors ("**Directors**") exercise control.

91. *Piercing through the first layer*, Atton Boro Group Affiliates ("**AB Affiliates**") control Atton Boro by virtue of its ownership of all the shares thereof (¶3,PO2). In ***Vacuum v. Ghana***, the Tribunal considered the holding of shares as a circumstance of control.[90]

92. *Piercing through the second layer*, AB Company controls Atton Boro through its "ultimate control" over AB Affiliates (¶3,PO2). In 1998, AB Company held shares in Atton Boro (**L**1575,PO3). From 1998 onwards, AB Company financed Atton Boro's operations to enable the latter to perform the agreements it had entered into with the NHA (**L**1572-1573,PO3). At present, AB Affiliates hold all the shares in Atton Boro. While AB Company may no longer hold title to Atton Boro shares, it continues to control Atton Boro through its ultimate control over the AB Affiliates (¶3,PO2).

93. Should the Tribunal look beyond the control of AB Company and *pierce through the third layer*, the Directors control Atton Boro. The Tribunal in ***Ulysseas v. Ecuador*** found ultimate

[88] *Plama,* Jurisdiction,¶170.
[89] *TSA,*¶140.
[90] *Vacuum*,¶44.

control in "the last company in the chain having natural persons as shareholders."[91] In the chain of control of Atton Boro, AB Company is the last company having natural persons as shareholders and Directors. As the Directors control AB Company, the Directors control Atton Boro (**L**1571,PO3).

94. As discussed above, Atton Boro is controlled by *AB Company* or by the *Directors*. Regardless of whether the Tribunal considers control to be exercised by *AB Company* or by the *Directors*, the *first* condition of control by citizens or nationals of a third State has been met.

95. A third State is a non-Contracting State,[92] or a State other than Basheera and Mercuria (¶1,PO1). *AB Company* is a national of Reef because it was organized under the laws of Reef (¶2,PO1). The *Directors* are nationals of various third States. The Record states that the *Directors* are of a "wide variety of nationalities" coming from "several different countries, *including* Basheera and Mercuria" (**L**1570-1572,PO3).

96. As it has been established that Atton Boro is controlled by citizens or nationals of a third State, the *first* condition for a denial of benefits has been satisfied.

b. Atton Boro has substantial business activities in Basheera, the place in which it is organized

97. Atton Boro was organized in Basheera (¶4,PO1), a country located in Westeros (**L**1564,PO3). Although Atton Boro has business activities in Basheera, such do not qualify as *substantial* business activities.

98. The Tribunal in ***AMTO v. Ukraine*** provided that "*materiality*" to the enterprise is the determinative factor of whether a business activity qualifies as substantial.[93] Atton Boro's

[91] *Ulysseas*,¶170.
[92] *Plama*, Jurisdiction,¶170.
[93] *AMTO*,¶69.

activities in Basheera are not substantial as they are not *material* to its enterprise of "manufacture and supply of essential medicines" (¶5,PO1).

99. In Basheera, Atton Boro engages in managing its portfolio of patents registered in South America and Africa, and providing support for AB Affiliates in South America and Africa (¶3,PO2). From this, two observations can be readily made. *First*, the activities are not material to Atton Boro's enterprise in Basheera, which is located in the Westeros region (**L**1564,PO3), as they are undertaken for entities in countries located in South America and Africa (¶3,PO2). *Second*, in the absence of a manufacturing or distribution base in Basheera, the activities are not material to Atton Boro's enterprise of "manufacture and supply of essential medicines" (¶5,PO1).

100. In ***AMTO v. Ukraine***, substantial business activities were appreciated even if the claimant only had two employees, an office space, and a bank account, because the decisive factor was the nature of the investor's enterprise – as a financial investment company, the claimant could operate with very few employees and infrastructure. Such circumstances do not obtain for Atton Boro because inherent to its enterprise is the "manufacture and supply of essential medicines" (¶5,PO1).

101. In ***AMTO v. Ukraine***, the Tribunal emphasized that substantiality means "of substance, and not merely of form."[94]Atton Boro cannot simply rent out an office space, open a bank account, and hire a handful of employees (¶4,PO1) to create an appearance of substantial business activities in Basheera.

102. Since it has been proven that Atton Boro has no substantial business activities in Basheera, the *second* condition for a denial of benefits has been satisfied.

103. As Mercuria timely invoked the Denial of Benefits clause, and proved that both conditions thereof obtain, Atton Boro is denied the benefits of the BIT. Atton Boro cannot pursue this arbitration proceeding. Thus, the Tribunal does not have jurisdiction.

[94] *Id.*

II. Mercuria did not violate the BIT

104. In determining a breach of an investment treaty, the Tribunal in ***Flughafen Zurich v. Venezuela*** emphasized that the "starting point must be the principle that all acts emanating from a State enjoy a presumption of legality."[95] Thus, Atton Boro must overcome the "presumptive lawfulness of governmental authority"[96] and discharge its burden of proving Mercuria's violation of the BIT.

105. In ***Hamester v. Ghana***, the Tribunal emphasized that the conditions of *attribution* and *illegality* must be established for a finding of a violation of an investment treaty.[97] Mercuria did not violate international law because the acts assailed are not attributable to it, and are not breaches of the BIT. In the absence of *attribution* and *illegality*, Mercuria did not violate the BIT.

A. The termination of the LTA by the NHA did not breach the Umbrella Clause

106. The NHA, on its own initiative, terminated the LTA because of Atton Boro's unsatisfactory performance (¶17,PO1). The Reef Arbitral Tribunal considered the NHA's act of termination a contractual breach (¶17,PO1). While the premature termination of the LTA is a breach of contract by the NHA, such does not amount to a breach of the Umbrella Clause by Mercuria.

107. *First*, the termination of the LTA was done by the NHA on its own initiative as an entity independent from the State (**L**1591,PO3). Thus, the termination of the LTA is not attributable to Mercuria (**A.1**).

[95] *Flughafen*,¶637.
[96] *Philip Morris*, Born Dissent,¶141.
[97] *Hamester*,¶14.

108. *Second*, the termination of the LTA is a mere contractual breach, determined by reference to its own governing contract law. Thus, the termination of the LTA is not a BIT breach (**A.2**).

A.1. The termination of the LTA by the NHA is not attributable to Mercuria

109. Customary international law, embodied in the ILC Articles,[98] governs State attribution. In ***Hamester v. Ghana***, the Tribunal identified three modes of attribution, which shared the common element of "*close link* to the State."[99] Under the ILC Articles, the *close link* may arise from being a *State organ* pursuant to Article 4 (**a**), being a *parastatal entity* in the exercise of its government function pursuant to Article 5 (**b**), or being under the *effective control* of the State pursuant to Article 8 (**c**).[100] The NHA's act of terminating the LTA is not attributable to Mercuria under any of the modes of attribution.

a. The NHA is not a State organ of Mercuria, thus there is no attribution

110. As it has been submitted above in the arguments on Jurisdiction,[101] the NHA is not a State organ under *Article 4 of the ILC Articles*.

111. In ***Hamester v. Ghana***, the Tribunal, in light of its definition of a State organ as an entity "part of the State's organic structure,"[102] ruled that the Ghana Cocoa Board was not a State organ as it was statutorily created as a "*corporate body*."[103]

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[98] *Jan de Nul*,¶89.
[99] *Hamester*,¶172.
[100] *Id.*
[101] *Supra* **I.A.2.a.i.**
[102] *Hamester*,¶172.
[103] *Id.*¶184.

112. The NHA is not part of Mercuria's organic structure because it is a creation of the NHA Act (**L**1593,PO3).The NHA Act did not confer the status of a State organ to the NHA, but instead structured the NHA as a "public sector corporation" organized by NHA trusts (**L**1593-1594,PO3).[104]

113. As the NHA exists independently and separately from Mercuria (**L**1591,PO3), it cannot be considered a State organ under international law.[105] Thus, NHA's LTA termination is not attributable to Mercuria.

b. The NHA did not exercise governmental authority when it terminated the LTA, thus there is no attribution

114. As it has been submitted above in the arguments on Jurisdiction, [106] at most, the NHA is a parastatal entity that occasionally exercises elements of governmental authority. Under *Article 5 of the ILC Articles*, a parastatal entity's acts are not attributable to the State unless a particular act is done in the exercise of governmental authority.

115. The Tribunal in ***Hamester v. Ghana*** emphasized that attribution requires the precise act in question to be "an exercise of such governmental authority and not merely an act that could be performed by a commercial entity."[107] Atton Boro cannot assert the sweeping conclusion that all acts of the NHA are attributable to the State. Attribution "requires an inquiry into the nature of each and every act of which the Claimant complains."[108]

[104] *Hamester*,¶184.
[105] *Noble*,¶69.
[106] *Supra* **I.A.2.a.i.**
[107] *Hamester*, ¶193.
[108] *Id.*¶197.

116. Atton Boro assails the LTA termination by the NHA. Contract termination is a private act that is purely commercial in nature. The NHA does not exercise any government authority when it terminates contracts, such as the LTA.[109] In ***Vivendi v. Argentina***, the host State was not considered responsible for the performance of contracts entered into by the parastatal entity that possessed separate legal personality.[110] Thus, Mercuria is not responsible for the NHA's LTA termination.

c. The NHA was not acting under the control of Mercuria when it terminated the LTA, thus there is no attribution

117. Under *Article 8 of the ILC Articles*, the acts of an entity are attributable to the State when it is proven that the entity is "in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

118. The Tribunal must determine whether Mercuria exercised effective control that led to the LTA termination. Neither the general direction exercised by Mercuria through its public health policy nor the status of the NHA as a public sector corporation amounts to effective control.[111] In ***Hamester v. Ghana***, the Tribunal held that effective control is a "*direct command*"[112] that entails "significant involvement, before the commission of the act in question."[113] It cannot be inferred from the Record that Mercuria *directly commanded* the NHA to terminate the LTA. Mercuria was not involved in the LTA termination for the following reasons.

[109] *Bosh,*¶176.
[110] *Vivendi*,¶96.
[111] *Hamester,*¶187.
[112] *Id.*¶198.
[113] *Id.*¶178.

119. *First*, Mercuria was not involved in the performance of the LTA by the NHA. "There is no record of direct participation by Mercurian officials in the negotiation of the LTA" (**L**1594-1595,PO3). Neither is there any factual indication that Mercuria caused the NHA to terminate the LTA (¶17,PO1). Had Mercuria been able to control the NHA, it would have kept the LTA effective to ensure a stable supply of greyscale drugs to its affected population (¶14,PO1).

120. Atton Boro cannot presume that Mercurian officials instructed the NHA[114] to terminate the LTA during the private meeting held several weeks prior to the actual termination by the NHA. All that is known about the meeting is based on media speculation that the NHA and Mercurian officials discussed budgetary problems that had arises in healthcare programs (¶16,PO1). Even if the newspaper reports accurately reported that the NHA and Mercurian officials discussed budgetary problems, such would not amount to effective control. In ***Hamester v. Ghana***, the Tribunal held that "being informed and discussing the case… does not mean that the [entity] was under the effective control of the Government."[115] Attribution does not extend to a State's incidental or peripheral association with an operation.[116] Thus, Atton Boro cannot inflate the situation by tainting the meeting as an opportunity for Mercuria to cause the LTA termination.

121. *Second*, the mere fact that the NHA was funded partially by Mercuria (**L**1592,PO3) does not in itself amount to effective control. The International Court of Justice in the case ***Nicaragua v. United States***, did not hold the respondent responsible for the violent acts of the rebel groups despite its "heavy subsidies"[117] and "general control"[118], as the claimant failed to adduce evidence to prove that the respondent "directed or enforced the perpetration of the acts."[119] Thus, Atton Boro cannot rely on the partial funding of Mercuria to support its claim of effective control.

[114] *Corfu* 18.
[115] *Hamester*,¶199.
[116] ILC COMMENTARY 70.
[117] *Nicaragua*,¶109.
[118] *Id.*¶115.
[119] *Id.*

122. Atton Boro failed to adduce evidence to prove that Mercuria directly commanded or effectively controlled the NHA to terminate the LTA. Thus, the NHA's LTA termination is not attributable to Mercuria.

A.2. Even if the LTA termination is attributable to Mercuria, Mercuria did not breach the Umbrella Clause

123. The termination of the LTA is not a breach of the Umbrella Clause because it is a mere contractual breach that had already been litigated by the Reef Arbitral Tribunal (**a**). Additionally, there was no sovereign interference to potentially elevate the contractual breach to a breach of the Umbrella Clause (**b**).

a. A mere contractual breach does not qualify as a breach of the Umbrella Clause

124. Atton Boro alleges Mercuria breached the Umbrella Clause of the BIT by "unilaterally terminating the LTA" (¶13,Notice). The act assailed is a contractual breach, which was already litigated by the Reef Arbitral Tribunal.

125. The Umbrella Clause of the BIT provides:

> "*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.*"[120]

126. In ***Duke v. Ecuador***, the subject investment treaty contained an identically worded umbrella clause – "*Each Party shall observe any obligation it may have entered into with regard to*

[120] Article 3.3, BIT.

investments."[121] The Tribunal rejected the elevation of a purely contractual claim to a breach of the umbrella clause even if the contracting parties agreed that the investment treaty would serve as the law of the contract. The Tribunal held:

> "*It is now a well-established principle that in and of itself the violation of a contract does not amount to the violation of a treaty. This is only natural since treaty and contract breaches are different things, responding to different tests, subject to different rules*."[122]

127. Several Tribunals have rejected the elevation of mere contractual breaches to BIT breaches, in light of the legal consequences of an expansive application of the umbrella clause.[123] The Tribunal in ***SGS v. Pakistan***, described the legal consequences as "so far-reaching in scope, and so automatic and unqualified and sweeping in their operation."[124]

128. The Tribunal, in ***El Paso v. Argentina***, identified the legal consequences of an expansive application of an identically worded umbrella clause – "*Each Party shall observe any obligation it may have entered into with regard to investments*."[125]

129. *First*, elevation would cause an *overly broad application* of the Umbrella Clause.[126] As the Umbrella Clause refers to "*any obligation*," should one consider the elevation of a contractual claim to a treaty claim, it would lead to the "unavoidable consequence that all claims based on any commitment… are to be considered as treaty claims."[127]

130. *Second*, elevation would be contrary to the principle of *effet utile* as it would render superfluous the other substantive treaty standards. Investors would not have to meet the higher

[121] Article II.3.c, Ecuador-US BIT.
[122] *Duke*,¶342.
[123] *Duke*; *SGS v. Pakistan*; *Pan American*; *Impregilo*; *CMS.*
[124] *SGS v. Pakistan*,¶167.
[125] Article II.2.c, US-Argentina BIT.

[126] *SGS v. Pakistan*,¶168.
[127] *El Paso*, Jurisdiction,¶72.

standard of proof required for claims of expropriation, FET violation, and other substantive provisions, as "a simple breach of contract… by itself, would suffice to constitute a treaty violation."[128]

131. *Third*, elevation risks a multiplicity of suits. The Tribunal recognized Professor Chirstoph Schreuer's concern that elevation "would necessarily imply that any commitments of the State in respect to investments, even the most minor ones, would be transformed into treaty claims."[129] Elevation would lead to the absurdity that a mere delay in payment or shortages in delivery are violations of an investment treaty.

132. Because of the burdensome impact of an expansive application of the Umbrella Clause, "clear and convincing evidence must be adduced"[130] by Atton Boro to effect the elevation of a contractual breach to a BIT breach. As Atton Boro failed to adduce clear and convincing evidence to support an expansive application of the Umbrella Clause, the contractual breach assailed does not amount to a breach of the BIT.

b. Additionally, without sovereign interference, Mercuria did not breach the Umbrella Clause

133. The ***Impregilo v. Pakistan*** Tribunal provided for the operative condition that would allow a contractual breach to constitute a breach of the Umbrella Clause, as it held:

> "*In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behavior going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign*

[128] *SGS v. Pakistan*,¶168.
[129] *El Paso*, Jurisdiction,¶82.
[130] *Id.* ¶167; *El Paso*, Jurisdiction,¶74.

authority ("puissance publique"), and not as a contracting party, may breach the obligations assumed under the BIT."[131]

134. The rationale behind the requirement of sovereign interference is the view that a contract sufficiently protects the contractual rights of parties from commercial acts, thus the protection of an umbrella clause only covers "conduct exorbitant from the one which a regular contractor could have adopted."[132]

135. In ***Sempra v. Argentina***, the Tribunal held that there is sovereign interference resulting to a contractual breach when the breach is "the outcome of *major legal and regulatory changes* introduced by the State."[133]

136. Atton Boro failed to prove that Mercuria has gone beyond its role as a contractual party, and exercised specific functions of sovereign authority[134] to cause the LTA termination. The LTA termination was done pursuant to *Clause 6* of the LTA (¶10,PO1), and not through any *major legal and regulatory changes*. Atton Boro cannot conveniently stretch and combine isolated circumstances to transform the purely commercial act of LTA termination[135] into an exercise of Mercuria's sovereign authority.

137. Therefore, as the NHA's termination of the LTA is wanting of the elements of *attribution* and *illegality*, Mercuria did not breach the Umbrella Clause.

[131] *Impregilo*,¶260.
[132] *Duke*,¶343.
[133] *Sempra*,¶311.
[134] *Impregilo*,¶278.
[135] *Bosh,*¶177.

B. The conduct of Mercuria's Judiciary did not breach the FET standard

138. Atton Boro initiated enforcement proceedings for its Award against the NHA in 2009 (¶18,PO1). Despite the pendency of enforcement proceedings (**L**1595,PO3), Atton Boro alleges that Mercuria breached the FET standard because of the Judiciary's "delay of over seven years" (¶13,Notice). However, "Atton Boro's claim falls far short of the high threshold for constituting an internationally wrongful act" (¶9,Response). Absent any *illegality* in the conduct of the Judiciary, Mercuria did not breach the FET standard.

B.1. Atton Boro must clearly and convincingly prove egregious conduct on the part of the Judiciary to support a claim of a breach of the FET standard

139. The Tribunal in ***Jan de Nul v. Egypt*** held that "the fair and equitable treatment standard encompasses the notion of denial of justice."[136] In ***Philip Morris v. Uruguay***, the Tribunal held that a claim of denial of justice requires "[a]n elevated standard of proof… due to the gravity of a charge which condemns the State's judicial system as such."[137] The elevated standard of proof is egregious conduct that "*shocks, or at least surprises, a sense of judicial propriety*."[138]

140. Atton Boro cannot assert the lower "*effectiveness of means*" standard to overcome the presumption of legality of the Judiciary's acts.[139] Providing effective means of asserting claims is merely an objective under the Preamble of the BIT, and not a substantive obligation equivalent to the FET standard. The Tribunal in ***Chevron v. Ecuador*** applied the *effectiveness of means* standard only because such was an independent obligation under the investment treaty.[140] Thus,

[136] *Jan de Nul*,¶188.
[137] *Philip Morris*, Award,¶499.
[138] *Chevron*, Merits,¶244; *Tecmed,*¶154; *Mondev*,¶127; *ELSI*,¶128.
[139] *Flughafen,*¶637.
[140] *Chevron*, Merits,¶244.

Atton Boro cannot equate the higher FET standard with the lower *effectiveness of means* standard to support its claim of a denial of justice.

141. Instead, Atton Boro must prove egregious conduct on the part of the Judiciary for the Tribunal to find a denial of justice.

B.2. Mercuria did not deny Atton Boro justice, and thus did not breach the FET standard

142. There could be a denial of justice if the "relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way."[141] None of the circumstances obtain in this case to support Atton Boro's claim that Mercuria's Judiciary denied it justice in the enforcement proceedings.

a. The seven-year pendency of the enforcement proceedings was not an undue delay amounting to a denial of justice

143. The Tribunal in ***Chevron v. Ecuador*** did not find "specific amount of delay alone [to result] in an automatic breach"[142] of the FET standard, as there are no prescribed time limits for the resolution of cases under international law.[143] For delay to amount to a denial of justice, the Tribunal must be satisfied by convincing evidence[144] that the delay was undue.[145]

[141] *Azinian,*¶102.
[142] *Chevron*, Merits,¶253.
[143] *White*,¶10.4.9.
[144] *El Oro*,¶9.
[145] *Chevron*, Merits,¶253.

144. International tribunals have considered the following factors in the determination of whether a delay amounts to a denial of justice: *complexity of the case*, *behavior of litigants*, and *behavior of the courts*.[146] A consideration of these factors would lead to the finding that there was no undue delay amounting to a denial of justice.

a.i. The complexity of the case precludes a finding of undue delay

145. As regards the *complexity of the case*, the complexity must be examined based on the circumstances surrounding the enforcement proceedings.[147] The enforcement of Atton Boro's Award is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"). The New York Convention provides a *public policy* exception to the enforcement of a foreign arbitral award.[148]

146. In the NHA's opposition to the enforcement, it invoked the *public policy* exception (¶18,PO1). The pending enforcement proceedings are complex because the Judiciary must first resolve the merits of the NHA's opposition.

147. In ***Jan de Nul v. Egypt***, the complexity of the case precluded a finding of undue delay.[149] Thus, the complexity of the enforcement proceedings negates a denial of justice.

a.ii. The behavior of litigants precludes a finding of undue delay

[146] *White*,¶10.4.10.

[147] *Philip*, Award,¶320.
[148] Article V.2.b, New York Convention.
[149] *Jan de Nul*,¶204.

148. As regards the *behavior of litigants*, Atton Boro contributed a delay of two years when it requested the Judiciary to erroneously transfer the case to a different bench (Notice-Exhibit).

149. Further, Atton Boro's positive behavior in the enforcement proceedings "qualify as admissions against interest for the purposes of considering if the delay experienced is unreasonable."[150] The Tribunal in ***Bosh v. Ukraine*** held, "Claimant are bound by their litigation strategy and its consequences."[151] After seven years of actively participating in the enforcement proceedings, Atton Boro's own behavior precludes a finding of undue delay amounting to a denial of justice.

a.iii. The behavior of the courts precludes a finding of undue delay

150. As regards the *behavior of the courts* of Mercuria's Judiciary, the enforcement proceedings did not involve "prolonged periods of complete inactivity"[152] that led the Tribunal in ***Chevron v. Ecuador*** to consider there was an unreasonable delay. Even Atton Boro's Timeline shows that there was no period of complete inactivity that lasted beyond four months (Notice-Exhibit).

151. In ***White v. India***, the Tribunal did not find a denial of justice despite the nine-year delay of the subject enforcement proceedings because it appreciated that interim issues arose that had to be addressed by the domestic courts before the resolution of the enforcement proceedings.[153] Similar circumstances obtain in the enforcement proceedings of Atton Boro's Award. Enforcement proceedings remained unresolved not due to a lack of reasonable celerity on the part of Mercuria's Judiciary, but due to the interim issues (proper venue, amendment of pleadings, and non-appearance of parties (Notice-Exhibit)) that had to be addressed.

[150] *Chevron*, Merits,¶267.
[151] *Bosh,*¶284.
[152] *Chevron*, Merits,¶256.
[153] *White*,¶10.4.17.

152. The active developments in the enforcement proceedings, in spite of the Judiciary's overburdened dockets (Notice-Exhibit), prove that the Judiciary's behavior precludes a finding of undue delay amounting to a denial of justice.

b. The Judiciary's conduct was not arbitrary or discriminatory

153. The Tribunal in ***Toto v. Lebanon*** defined an unreasonable or discriminatory measure as one "that is not based on legal standards, but on discretion, prejudice or personal preference."[154] Pursuant to the New York Convention,[155] Mercuria's Judiciary conducted the enforcement proceedings in accordance with its procedural laws.

154. In its Timeline (Notice-Exhibit), Atton Boro assails the conduct of Mercuria's Judiciary by tainting the Judiciary's application of its procedural laws. Atton Boro cannot merely rely on minor procedural errors in establishing its claim.[156] In ***Arif v. Moldova***, the Tribunal held that in the absence of "fundamentally unfair proceedings and outrageously wrong, final and binding decisions,"[157] there is no denial of justice.

155. Mercuria will address the following acts assailed by Atton Boro: *grant of reliefs to the NHA*, *allowance of the NHA's amended application*, *transfers of venue of the proceedings*, and the *Judge's remark*. Mercuria will prove that the assailed acts are not arbitrary or discriminatory, but based on legal standards defined in its procedural laws and under international law.

b.i. The grant of reliefs to the NHA was not arbitrary or discriminatory

[154] *Toto*, Award,¶157.
[155] Article III, New York Convention.
[156] *Philip*, Award,¶500.
[157] *Arif*,¶443.

156. In ***White v. India***, the Tribunal, while considering the domestic court to be generous in granting reliefs to the opposing party, did not find arbitrary or discriminatory conduct as it appreciated that both the investor and the opposing party were granted various reliefs.[158] Mercuria's Judiciary similarly granted various reliefs and extensions to both the NHA and Atton Boro during the enforcement proceedings (Notice-Exhibit).

157. Further, the fact that the Judiciary did not rule on each and every objection made by Atton Boro is not arbitrary or discriminatory. The Tribunal in ***Philip Morris v. Uruguay*** recognized that "it is not incumbent on courts to deal with every argument presented in order to reach a conclusion."[159]

b.ii. The allowance of the NHA's amended application was not arbitrary or discriminatory

158. Atton Boro assails the allowance of the NHA's amended application on the ground that a retroactive application of a Supreme Court decisions is allegedly against Mercuria's procedural law. However, Atton Boro failed to show how such retroactive application was "so bereft of a basis in law, that the judgements were in effect arbitrary or malicious."[160] The Tribunal in ***Mondev v. United States*** even recognized that it is within the discretion of local courts "to apply new decisional law retrospectively."[161] Thus, absent a malicious misapplication of law, the conduct of Mercuria's Judiciary is not arbitrary or discriminatory.[162]

[158] *White,*¶11.4.8.
[159] *Philip*, Award,¶557.
[160] *Azinian,*¶105.
[161] *Mondev,*¶137.
[162] *Azinian,*¶103.

b.iii. The transfers of the venue of proceedings was not arbitrary or discriminatory

159. Atton Boro assails the two transfers of venue of proceedings, which were both initiated by the parties themselves based on varying Supreme Court decisions (¶¶17,26,Notice-Exhibit).

160. The fact that both transfers were granted based on inconsistent decisions by the Supreme Court does not make them arbitrary or discriminatory. In ***Eli Lilly v. Canada***, the Tribunal held that "inconsistency in judicial interpretation at this limited scale is to be expected."[163] The two transfers may at most be considered "less than ideal,"[164] but as they were based on legal standards and not on prejudice, they were not arbitrary or discriminatory.[165]

b.iv. The Judge's remark was not arbitrary or discriminatory

161. Atton Boro assails the Judge's remark that it should be more accommodating of the NHA in the enforcement proceedings (¶14,Notice-Exhibit). The Tribunal in ***Mondev v. United States***, while appreciating that a similar remark made by the judge "might raise a delicate judicial eyebrow,"[166] ultimately held there was no arbitrariness or discrimination as the court had other sufficient basis to support its rulings. Similarly, Mercuria's Judiciary did not base any of its orders on the Judge's remark of accommodation, but on the legal standards defined in Mercuria's procedural laws. Thus, the Judge's remark was not arbitrary or discriminatory.

[163] *Eli Lilly,*¶421.
[164] *White*,¶11.4.5:
[165] *Id.*
[166] *Mondev,*¶134.

162. Given the totality of circumstances,[167] Mercuria did not deny Atton Boro justice. There was neither undue delay nor arbitrary or discriminatory conduct on the part of the Judiciary. Thus, Mercuria did not breach the FET standard.

C. The amendment of the IP Law and the grant of the compulsory license did not breach the FET standard

163. Atton Boro claims that Mercuria breached the FET standard of the BIT when it enacted compulsory licensing measures that affected its Patent. Specifically, Atton Boro asserts that Mercuria disregarded TRIPS (¶13,Notice).

164. In finding a breach of the FET standard, the Tribunal in ***El Paso v. Argentina*** emphasized that "a balance should be established between the legitimate expectation of the foreign investor… and the right of the host State to regulate."[168] Applying the balancing test, Mercuria did not breach the FET standard because the compulsory licensing measures were consistent with Atton Boro's legitimate expectations (**C.1**) and were justified by Mercuria's public health policy (**C.2**).

C.1. Mercuria's compulsory licensing measures did not violate Atton Boro's legitimate expectations

[167] *Chevron*, Merits,¶250.
[168] *El Paso*, Award,¶358.

165. The Tribunal in ***Saluka v. Czech Republic*** held that legitimate expectations are "based on an assessment of the state of the law and the totality of the business environment at the time of the investment."[169]

166. While the FET standard acknowledges that Atton Boro had expectations when it made its investment, "all the elements that the investors would like to rely on… cannot be considered legitimate."[170] To determine whether the compulsory licensing measures violated Atton Boro's legitimate expectations, the Tribunal must first objectively recognize the extent thereof.

167. Atton Boro's legitimate expectations can be identified by an assessment of the legal and business environment[171] in 1998 when Atton Boro obtained the Patent assignment over the compound Valtervite (¶4,PO1).

168. As regards the legal environment in 1998, Mercuria's domestic laws, TRIPS, and the BIT concurrently governed the intellectual property ("**IP**") rights of foreign investors.

169. While Mercuria's IP Law did not contain a compulsory licensing provision in 1998, TRIPS expressly granted Mercuria the power to enact compulsory licensing measures.[172] The BIT did not preclude the exercise of such power as the Contracting Parties of the BIT intended not to disregard but to "build on"[173] international agreements such as TRIPS (¶2,PO2). Thus, it was within Atton Boro's legitimate expectation that Mercuria *could* at any time enact compulsory licensing measures.

[169] *Saluka*,¶301.
[170] *El Paso*, Award,¶355.
[171] *Saluka*,¶301.
[172] Article 30, TRIPS.
[173] Preamble, BIT

170. As regards the business environment in 1998, the pharmaceutical industry was faced with the growing trend of compulsory licensing in developing countries in South America and in Africa,[174] the regions wherein Atton Boro operates (¶4,PO1). Developing countries began resorting to compulsory licensing, in light of the TRIPS "Principle" that "[m]embers may… adopt measures necessary to protect public health."[175] Further, when Atton Boro invested in Mercuria in 1998, it was aware of Mercuria's Constitutional mandate to secure universal healthcare (¶2, Annex 2) and Mercuria's status as a developing country (Response). Thus, it was within Atton Boro's legitimate expectations that Mercuria *would* enact compulsory licensing measures.

a. Mercuria made no specific commitment that it would not amend its IP Law or grant a compulsory license for Valtervite

171. There was no legitimate expectation that Atton Boro's IP Law would not change in the absence of a specific commitment. The Tribunal in ***Philip Morris v. Uruguay*** held that there was no violation of legitimate expectations when the host State amended its laws affecting the investor's IP right, as the Tribunal recognized that "[p]rovisions of general legislation applicable to a plurality of persons, do not create legitimate expectations that there will be no change in the law."[176] Atton Boro cannot base its expectations of a static regulatory framework on the absence of compulsory licensing provisions in the IP Law.

172. In ***Philip Morris v. Uruguay***, the Tribunal emphasized that the only time wherein an investor could expect that the laws would not change is when there are "specific undertakings and representations made by the host State to induce investors to make an investment."[177] Atton Boro obtained its Patent without inquiring on the prospects of a change in the regulatory framework, and without securing any specific commitment from Mercuria that it would not

[174] BOND 3.
[175] Article 8, TRIPS.
[176] *Philip*, Award,¶426.
[177] *Philip*, Award,¶426.

amend its IP Law.[178] Thus, Atton Boro cannot claim that its legitimate expectations were violated when Mercuria amended its IP Law to provide for compulsory licensing.

173. There was no legitimate expectation that Atton Boro's Patent would not be subject of compulsory licensing in the absence of a specific commitment. The Tribunal in ***Philip Morris v. Uruguay***, held that an IP right is not a specific commitment of exemption from the State's regulatory power.[179] Atton Boro cannot rely on Mercuria's grant of its Patent as a specific commitment that its rights thereunder are absolute.

174. The Tribunal in ***Chevron v. Ecuador*** held, "[a]n investor must point to representations and assurances that were given when the initial investment was made and how these have been reneged upon."[180] The Record is bereft of any indication that Mercuria induced Atton Boro to invest in 1998 through any specific representation that it would exempt the latter's Patent from regulatory measures. Thus, Atton Boro cannot claim that its legitimate expectations were violated when Mercuria subjected its Patent to compulsory licensing.

b. Mercuria did not violate Atton Boro's legitimate expectations as it did not disregard TRIPS

175. Article 1 of TRIPS recognizes that Mercuria has the freedom to "determine the appropriate method of implementing the provisions of [TRIPS] within [its] own legal system and practice." Thus, TRIPS does not provide stringent requirements for a State's implementation of compulsory licensing, other than compliance with the minimum conditions under Article 31 thereof. While Mercuria sustains its position that the Tribunal has no jurisdiction to adjudicate a

[178] *Id.*¶427.
[179] *Id.*¶481.
[180] *Chevron*, Merits,¶228.

breach of TRIPS,[181] it submits that its compulsory licensing measures fully accord to the minimum conditions under Article 31. Therefore, Mercuria did not violate Atton Boro's legitimate expectations.

b.i. Mercuria complied with Article 31.b of TRIPS

176. Article 31.b of TRIPS allows Members to unilaterally issue a compulsory license when there is a "*national emergency*." The issuance of the compulsory license, without HG-Pharma attempting at prior negotiations for a voluntary license, is valid in light of the national emergency caused by the greyscale health crisis.

177. The Doha Declaration on the TRIPS Agreement and Public Health ("**Doha Declaration**") affirmed Mercuria's "right to determine what constitutes a national emergency."[182] The Doha Declaration recognized that "public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency."[183] Greyscale is a "critical epidemic disease" classified along with HIV/AIDS, tuberculosis, and malaria (¶2, PO1), thus the greyscale health crisis is a national emergency.

178. There is a greyscale health crisis amounting to a national emergency for several reasons.

179. *First*, greyscale is a chronic and incurable (Annex 3) epidemic classified among "critical epidemic diseases that threaten populations in the developing world" (¶2,PO1). It severely affects the quality of life of patients, as it causes "cracking and flaking of the skin… progressively stiffening muscles, swollen limbs, and severe joint pain" (Annex 3).

[181] *Supra* **I.A.2.c.**
[182] Par. 5.c, Doha Declaration.
[183] *Id.*

180. *Second*, the number of patients has been increasing at an alarming rate. From 20,485 persons in 2003, the number of persons affected with greyscale is estimated to have increased by 1199.9% to 266,298 persons in 2006 (Annex 3).

181. *Third*, in late 2008 to 2009, medical consensus revealed, "sexual contact is only one of several transmission routes for greyscale" (**L**1584-1585,PO3). The revelation that greyscale can be transmitted through additional routes aggravated the crisis as even those that do not engage in sexual activity are at the risk of contracting greyscale.

182. *Fourth*, during the period between the LTA termination and the first HG-Pharma delivery, "medical consensus [was] that there is no effective greyscale treatment for patients in Mercuria" (**L**1583-1584**,**PO3). The lack of effective greyscale treatment was due to the fact that Atton Boro's Sanior, the only effective greyscale treatment that met global standards (¶6,PO1), was no longer being subsidized by entities such as the NHA. Without subsidies, Sanior costs each patient $36 per day or $10,000 per year (Annex 3), an amount significantly above the annual minimum wage rate in developing countries such as Mercuria.

183. As the compulsory license was issued to address the national emergency brought about by the greyscale health crisis, Mercuria was not required under TRIPS to ensure that HG-Pharma attempt at voluntary licensing. Thus, the issuance of the compulsory license conforms to TRIPS.

b.ii. Mercuria complied with Article 31.f of TRIPS

184. Article 31.f of TRIPS requires Mercuria to ensure that the compulsory license is used to "*predominantly*" supply the domestic market. Mercuria must ensure against the export of more than 49.9% of the total amount of drugs manufactured by HG-Pharma.[184] Under Article 31.f of

[184] THOMAS.

TRIPS, Mercuria is not precluded from buying an amount of the generic drug from HG-Pharma and exporting such as humanitarian aid (¶23,PO1), provided that the amount exported remains below the 49.9% threshold. However, contrary to what Atton Boro asserts, HG-Pharma does not even export Valtervite (¶5,PO2). The Record states that Mercuria distributed Atton Boro's Sanior, not HG-Pharma's generic drug, to its neighboring countries in the form of humanitarian aid (**L**1580,PO3). Thus, the issuance of the compulsory license conforms to TRIPS.

b.iii. Mercuria complied with Article 31.h of TRIPS

185. Article 31.h of TRIPS requires *adequate remuneration* be paid to the patent holder. The WTO intentionally left adequate remuneration undefined to allow Members discretion.[185] Mercuria properly exercised its discretion when it ordered a royalty rate of 1% of total earnings (¶21,PO1). The royalty is *adequate remuneration* for the following reasons.

186. *First*, the High Court considered the fact that Atton Boro had made full use of its Patent rights for twelve years. Under the LTA alone, during the lifetime of the LTA, Atton Boro made at least $16.6 Billion (¶15,PO1; Annex 3), which is 1,560% more than the $1 Billion it expected to make (Annex 3) during the ten-year period of the LTA (¶10,PO1). The remuneration is adequate considering that the royalty is not the only source of income of Atton Boro, but is given in addition to the regular revenue stream from Atton Boro's sale of Sanior.

187. *Second*, the 1% royalty rate is adequate when compared to regional and domestic rates. Regionally, the World Health Organization reported that royalty rates for anti-retroviral drugs in Africa and South America, wherein Mercuria is located (¶4,PO1), range from 0.5-2.5%.[186] Domestically, royalty rates for drugs to treat incurable diseases range from 0.5-3% (PO3). The remuneration is adequate following a comparison with the industry average.

[185] REMUNERATION GUIDELINES 9.

[186] *Id.*

188. *Third*, authorities have further acknowledged that patent holders "should be willing to accept remuneration lower than the normal" when a compulsory license is issued to address public health problems.[187] The remuneration is adequate considering the purpose of the compulsory license was to address the greyscale public health concern.

b.ii. Mercuria complied with Article 31.i and Article 31.j of TRIPS

189. Article 31.i and Article 31.j of TRIPS require a mechanism for judicial review to be made available to Patent holders subject of compulsory licensing. Mercuria's law provides for judicial review before a two-judge bench of the High Court (**L**1579-1580,PO3). Through the review mechanism, Atton Boro could have questioned the grant of compulsory license to HG-Pharma, yet it failed to do so.

190. Had Atton Boro truly believed that the compulsory license was improperly granted, and that the royalty rate was inadequate, Atton Boro should have immediately redressed its grievance through judicial review.

C.2. Additionally, Mercuria did not breach the FET standard, as its compulsory licensing measures were enacted pursuant to its police power

[187] HAOCHEN 14.

191. While Mercuria acknowledges its obligation under the BIT to protect Atton Boro's investment, such obligation is "neither absolute nor unqualified."[188] Atton Boro's investment is subject to Mercuria's police power. In ***Parkerings v. Lithuania***, the Tribunal emphatically held:

> "*It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion… As a matter of fact, any businessman or investor knows that laws will evolve over time*."[189]

192. The BIT itself recognizes Mercuria's right and privilege to exercise its police power, as the Preamble states that investment protection must be achieved "*in a manner consistent with the protection of health*." Thus, Atton Boro's investment rights do not take precedence over Mercuria's police power and its Constitutional duty to promote public health.

193. The Tribunal in ***Philip Morris v. Uruguay*** rejected the claim that the BIT was breached, as it upheld the exercise of the host State's police power in enacting "regulatory measures designed specifically to protect public health."[190] Mercuria did not breach the BIT because it validly exercised its police power when it enacted compulsory licensing measures to address the greyscale public health crisis.

194. Greyscale is a public health crisis,[191] as it is spreading at an alarming rate through several transmission routes. The nature and symptoms of greyscale are severe; hence treatment is necessary to sustain a decent quality of life and to prevent the spread of the disease. The lack of access to affordable and effective greyscale treatment perpetuates the crisis.

[188] *Barcelona*,¶33.
[189] *Pakerings*,¶332.
[190] *Philip Morris*, Award,¶298.
[191] *Supra* **II.C.1.b.i.**

195. In the Tribunal's assessment of the validity of Mercuria's exercise of police power, the Tribunal must begin with the "principle that all acts emanating from a State enjoy a presumption of legality."[192] The Tribunal in ***Philip Morris v. Uruguay*** emphasized:

> "The responsibility for public health measures rests with the government and investment tribunals should pay great deference to governmental judgments of national needs in matters such as protection of public health."[193]

196. Mercuria validly exercised its police power as the compulsory licensing measures are reasonable, proportional, and non-discriminatory.[194]

a. The compulsory licensing measures were reasonable

197. The standard of *reasonableness* is met when there is a "logical connection" between the measure and the policy objective.[195] The Tribunal in ***El Paso v. Argentina*** upheld the validity of the host State's measures as it appreciated that the measures were "based on a reasoned scheme to answer a major crisis and effectively had the desired result."[196]

198. Mercuria's compulsory licensing measures were based on a reasoned scheme to address the greyscale public health crisis. Through the compulsory licensing measures, Mercuria aimed to provide affordable access to greyscale treatment, in an effort to mitigate the effects of greyscale and prevent the further spread thereof. The compulsory licensing measures achieved the desired result – HG-Pharma was able to manufacture a generic version of Sanior and price it at 80% less (¶22,PO1), thus allowing patients to sustainably access greyscale treatment.

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[192] *Flughafen*, ¶637.
[193] *Philip Morris*, Award,¶399.
[194] *Id.*¶305.
[195] *Id.*¶359.
[196] *El Paso*, Award,¶325.

b. The compulsory licensing measures were proportional

199. The standard of *proportionality* is met when there is "a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized."[197] The Tribunal in ***LG&E v. Argentina*** upheld the validity of the host State's measures, "[e]ven though the measures adopted by [the State] may not have been the best,"[198] as "an across-the-board response was necessary" to achieve the State's objectives.[199]

200. Mercuria's compulsory licensing measures were necessary to achieve its objective of addressing the greyscale health crisis. Were it not for the compulsory license grant to HG-Pharma, the objective would not have been achieved because patients would have been left with only two choices – affordable yet ineffective treatments or an effective yet unaffordable treatment (¶6PO1; Annex 3). The compulsory license gave patients the option of purchasing HG-Pharma's generic drug, which is an affordable and effective treatment for greyscale.

201. To achieve the objective, the compulsory licensing measures imposed a charge on Atton Boro's Patent. The Patent was affected by the grant of compulsory license because this resulted in the diminution of Atton Boro's right to exclusively use the patented Valtervite compound. Other than the diminution of the exclusive use of Valtervite, the compulsory licensing measures imposed no other charge on Atton Boro's investment. Atton Boro still held its Patent, and had every right to use Valtervite for the manufacture and sale of Sanior. Thus, even if a compulsory license was granted, Atton Boro was able to maintain its revenue stream from the sale of Sanior (¶24,PO1), and had it accepted the tender of payment (**L**1597-1698,PO3), it would have earned additional revenue from royalties.

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[197] *Tecmed*,¶122.
[198] *LG&E*.¶162.
[199] *Id*.¶257.

202. Mercuria established a reasonable relationship of proportionality between its objectives and the charge imposed on Atton Boro's Patent investment,[200] thus proportionality is established.

c. The compulsory licensing measures were not discriminatory

203. There is *discrimination* when a State's treatment intentionally favors a national against a foreign investor.[201] The fact that HG-Pharma, a national entity (PO1), benefited from the grant of compulsory license over the Patent of Atton Boro, a foreign investor, does not automatically give rise to a claim of discrimination.

204. Atton Boro's Patent was subject to compulsory licensing not because of Atton Boro's status as a foreign investor, but because the Valtervite Patent met the conditions under the IP Law (Annex 4). Valtervite was the only effective greyscale treatment, and Atton Boro had already enjoyed the exclusive use thereof for a twelve-year period (¶4,PO1). Considering "the nature of the invention, the time which has elapsed since the sealing of the patent and the measures already taken by the patentee," pursuant to Section 23.C.4 of the IP Law (Annex 4), the High Court found it proper to subject the Patent to compulsory licensing. Thus, there was no intentional treatment against a foreign investor.

205. HG-Pharma was the entity in whose favor a compulsory license was granted. The High Court granted HG-Pharma's application not because of its nationality, but because it satisfied the conditions provided under Section 23.C.4 of the IP Law. HG-Pharma had the ability "to work the invention to the public advantage" and the capacity "to undertake the risk in providing capital and working the invention" (Annex 4). Thus, there was no intentional treatment in favor of a national.

[200] *Tecmed,*¶122.
[201] *LG&E,*¶146.

206. Absent intentional treatment in favor of a national and against a foreign investor, *non-discrimination* is established.

C.3. Atton Boro's actions belie its claim that Mercuria breached the FET standard

207. Atton Boro, after being impleaded (**L**1576-1577,PO3), did not oppose the issuance of the compulsory license during the application hearing. For six years from the issuance of the compulsory license, Atton Boro did not contest the issuance of the compulsory license.

208. Atton Boro initiated the arbitration proceedings pending before the Tribunal as an afterthought only when its Sanior operations failed (¶25,PO1). The business problems experienced by Atton Boro can only be attributed to its decision not to lower the $36 per day price of Sanior (Annex 3), despite operating in a developing country market with limited spending capacity. The Tribunal in ***EDF v. Romania*** warned that an investor "may not rely on a bilateral investment treaty as a kind of insurance policy."[202] Atton Boro cannot recover its business losses by belatedly shifting the blame to Mercuria.

209. While the introduction of HG-Pharma's generic drug, as a result of the compulsory license issuance, may have challenged Atton Boro's market position (¶24,PO1), such does not amount to a breach of the FET standard. In ***Feldman v. Mexico***, the Tribunal recognized that "not every business problem experienced by a foreign investor"[203] as a result of a "governmental regulatory activity that makes it difficult or impossible for an investor to carry out a particular business"[204] is a breach of the FET standard.

[202] *EDF*,¶217.
[203] *Feldman*,¶112.
[204] *Id.*

III. Atton Boro is not entitled to compensation of $1.54 Billion

210. Atton Boro has no basis for claiming compensation as it fails to establish an "internationally wrongful act" with respect to the BIT. The ILC Articles provides for "reparations" only in the event of an injury "caused by the internationally wrongful act."[205] Since no breach of the BIT was established, Atton Boro cannot seek reparation in the form of compensation.

211. Even if the Tribunal finds that there has been a breach of the BIT, it cannot award Atton Boro compensation because of its failure to substantiate the $1.54 Million Amount. The ILC Articles requires that the amount claimed must be "financially assessable."[206] The Tribunal in ***LG&E v. Argentina*** ruled that "[p]rospective gains which are highly conjectural, 'too remote or speculative'" are disallowed as claims.[207] As the amount due has not been established, neither can interest be awarded. In ***LIAMCO v. Libya,***[208] the Tribunal held that interest is only due on claims on money whose amount is known and determined.

[205] Article 31, ILC Articles.
[206] Article 36, ILC Articles.
[207] *LG&E,*¶89.
[208] *Liamco* 8.

REQUEST FOR RELIEF

212. For the above reasons, Mercuria hereby requests the Tribunal to:

(1) Find that it has no jurisdiction over the present dispute;

(2) Find that Mercuria has validly denied Atton Boro the benefits under the BIT;

(3) Declare that Mercuria is not liable for the violations of the BIT;

(4) Declare that Mercuria is not liable to pay compensation;

(5) Grant such further relief as counsel may advise and that the Tribunal deems appropriate.

Respectfully submitted on 25 September 2017 by

GUERRERO

On behalf of the Republic of Mercuria